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No. 87-1245

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TEXAS MONTHLY, INC.,
Appellant,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND ANN RICHARDS, TREASURER OF THE STATE OF TEXAS,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE MAGAZINE PUBLISHERS OF AMERICA, INC., *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE MAGAZINE PUBLISHERS OF AMERICA, INC.

Movant is a national trade association of magazine publishers who publish consumer interest magazines. The written consent of the appellant, Texas Monthly, Inc., has been obtained and filed with the clerk of this Court. The consent of the appellees has been requested and refused.

Movant seeks to submit a brief *amicus curiae* because it shares with appellant a vital interest in the outcome of this proceeding. The imposition of the Texas sales tax on ap-

pellant's and other publications, but not on certain religious publications, impermissibly abridges appellant's and other publishers' rights and involves the State of Texas in the advancement of a religious faith in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Movant requests this Court to grant leave to file the accompanying brief *amicus curiae* to present its views to this Court urging reversal of the opinion of the court below.

/s/

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ON APPEAL FROM THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

BRIEF OF THE MAGAZINE PUBLISHERS OF AMERICA, INC., *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Magazine Publishers of America, Inc., (MPA) is a national trade association including in its membership more than 200 magazine publishing firms that publish about 900 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications related to literature, religion, law,

political affairs, science, agriculture, industry and many other interests, avocations, and pastimes of the American people.

MPA shares with Texas Monthly, Inc., and others a commitment to exercise and preserve First Amendment liberties protected by the Constitution and this Court. We believe that the decision of the Texas Court of Appeals upholding the constitutionality of the Texas sales tax abridges the Freedom of Speech and of the Press of all but the exempt; and, because of the exemption solely of religious publications, the statute involves the State of Texas in the advancement of a religious faith in violation of the Establishment Clause of the First Amendment.

SUMMARY OF ARGUMENT

In upholding the constitutionality of the Texas retail sales tax, which applied to all publications except publications consisting wholly of religious writing published or distributed by a religious faith, the Texas Court of Appeals misread this Court's decision in *Arkansas Writers' Project v. Ragland*, 107 S Ct 1722; 95 L Ed 2d 209. The Texas court construed *Arkansas Writers' Project* to apply only when the press in general is singled out for taxation, or when a small number of publications are taxed. That narrow reading of the case ignores this Court's specific finding that the Arkansas tax was unconstitutional because the application of the tax depended entirely on content of the publication. In that sense, the Texas statute is identical to the Arkansas statute: the applicability of the tax is determined by the content of the publication.

The Texas court failed to apply the proper standard to test the validity of statutes suspected of infringing on First Amendment rights. The Texas court applied the "rational legislative purpose" standard and put the burden of proof on appellant

to negate the reasonableness of the tax. In cases involving First Amendment rights, the proper standard imposes upon the state the burden to prove that a statute serves a compelling state interest and is narrowly drawn to achieve that purpose.

The Texas court also erred in finding that the exemption of religious publications does not violate the Establishment Clause of the First Amendment. By requiring the state to judge which publishers and publications are eligible for tax exemption, the state becomes inextricably involved in religious affairs, and by exempting religious publications from a tax applicable to all other publications, the state necessarily advances the cause of a religious faith in violation of the Establishment Clause of the First Admendment.

ARGUMENT

1. The Texas sales tax, which applies to publications based on the content of the publication, impermissibly restricts expression based on its message.

In 1985, Texas Monthly, Inc., publisher of *Texas Monthly*, sued in the district court of Travis County, Texas, for a refund of sales tax revenues collected and paid to the state in 1985 for the sale of its magazine. The district court agreed with the plaintiff that section 151.312 of the Texas Tax Code, exempting certain religious publications from the payment of sales taxes, "constitutes an unlawful discrimination based on the content of Plaintiff's publication in violation of its rights under the First and Fourteenth Amendments" of the Constitution of the United States. J.S. App. 42. On appeal, a majority of the Texas Court of Appeals reversed, holding that the statute did not discriminate in violation of the plaintiff's right of free speech, but merely protected the church and

church publications from governmental interference. Two months later, following this Court's decision in *Arkansas Writers' Project v. Ragland*, 107 S Ct 1722; 95 L Ed 2d 209, the majority withdrew its initial opinion and issued a second opinion. In that opinion, the Texas court concluded that *Arkansas Writers' Project* was not applicable to the issue before the court, saying:

> The Supreme Court determined that the tax exemption in *Ragland* was so broad that it had the effect of singling out a very small group of magazines for *taxation*. This appeal, to the contrary, presents the opposite situation. The great mass of publishers remain subject to the sales tax. The Legislature has rationally determined to *exempt* religious publications as a means of furthering the separation of church and state. Neither of the situations deemed objectionable by the Supreme Court in *Ragland* is presented in this appeal. 731 SW 2d 160, 165; J.S. App. 9.

The Texas court misread *Arkansas Writers' Project*. This Court's statement that the Arkansas tax applied to "only a few" magazines was descriptive of the tax, not dispositive of the issue of its constitutionality. Comparing the applicability of the Arkansas sales tax to the paper-and-ink tax in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 103 S Ct 1365; 75 L Ed 2d 295 (1983), this Court made clear that the Arkansas sales tax was the far more intrusive upon First Amendment rights:

> Indeed, this case involves a more disturbing use of selective taxation than Minneapolis Star, because of the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends en-

> tirely on its *content*. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subect matter, or its content." [Citations omitted] "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." [Citations omitted] 95 L Ed 2d at 219-220.

The Texas sales tax fits perfectly the description of the forbidden Arkansas tax: the Texas tax applies *based on the content of the publication*. Only periodicals "published or distributed by a religious faith" that "consist wholly of writings promulgating the teaching of the faith . . . " are exempt from taxation. Texas Tax Code, § 151.312. The method selected by both legislatures, to tax publications *based on content*, is unconstitutional.

II. The Texas Court of Appeals applied the wrong judicial standards for testing the constitutionality of the sales tax statute.

The Texas Court of Appeals, citing *Carmichael v. Southern Coke and Co.*, 301 US 495 (1936) and *Madden v. Kentucky*, 309 US 83 (1940) (neither of which involved First Amendment liberties), tested the constitutionality of the Texas sales tax on the basis of whether the legislature had a "rational legislative purpose" in enacting the exemption, and imposed upon the appellant the burden "to negate every conceivable basis which might support" the tax discrimination. Those standards are not the proper standards for evaluating the constitutionality of state action where First Amendment rights are involved. As this Court made clear in *Arkansas Writers' Project:*

> Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of

> magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. [Citation omitted] 95 L Ed 2d at 221. See also *Minneapolis Star & Tribune*, at 591-592.

This doctrine of "strict scrutiny" imposes a much greater burden upon the state than that prescribed by the Texas court, and the court's failure to follow that higher standard denied Appellant's First Amendment rights.

III. The Texas statute authorizing the state to exempt religious publications from the sales tax impermissibly involves the state in religion and advances the cause of a religious faith.

The Texas Court of Appeals upheld the exemption of religious publications against *Texas Monthly's* contention that the exemption constituted a law "respecting an establishment of religion" in violation of the First Amendment. The Texas court tested the exemption against the three-part test prescribed by this Court in *Lemon v. Kurtzman*, 91 S Ct 3205; 29 L Ed 3d 745 (1971). In that case, this Court said:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive entanglement with religion." 219 L Ed 2d at 755.

The Texas court found that the exemption has a "secular legislative purpose", that purpose being to achieve "neutrality" of state action. J.S. App. 5. But neutrality is not achieved by granting preferences; it is achieved by ensuring impartiality. A statute that grants tax exemptions *only* to religious

publications is not neutral and no secular purpose is served. The Texas statute fails the first *Lemon* test.

The Texas statute fails the second *Lemon* test of "primary effect" because the *sole* effect of the Texas exemption is to relieve the publishers or distributors of religous publications from paying taxes. The inevitable effect of this singular exemption is to lend state assistance to advance the cause of the religions so favored.

Finally, the Texas statute fails the third *Lemon* test because the statute requires the state to determine whether the publisher is a "religious faith" and whether the publication "consist wholly of writings promulgating the teaching of the faith." Texas Tax Code, 151.312. The state's response, that it does not carefully administer the statute, J.A. 60-61, does not satisfy a challenge to the constitutionality of the law. Appellant does not complain about the behavior of employees in the Comptroller's office; appellant complains about the state's entanglement in matters of religion required by the statute. The statute demands that the state determine eligibility for exemption, a duty that requires ascertaining the validity of an applicant's claim that it is a religious faith. To make that judgment, the state must both define a religious faith and determine who qualifies for exemption; otherwise, *anyone* claiming to be a "religious faith" — the Disciples of Christ or the Devil's Disciple — could receive an exemption from taxation. Unless the Comptroller abandons his constitutional responsibility to enforce the revenue laws, he *must* determine whether the publisher is a "religious faith" and whether the publication's contents promulgate the "teaching of the faith." Excessive entanglement is inevitable, and even if the elusive goals of defining "religious faith" and identifying its teachings are achieved, the cause of the religious faith so identified is, by the exemption from taxation, impermissibly advanced by the state.

CONCLUSION

We respectfully urge this Court to reverse the decision of the Texas Court of Appeals and affirm the judgment of hte district court.

Respectfully submitted,

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